Supreme Court, U.S.
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No. 01-1281

In The

Supreme Court of the United States

CHAD LOUIS MAXWELL,

Petitioner,

vs.

KORI RENE WYMAN, *et vir,*

Respondents.

On Petition For A Writ Of Certiorari To The Oklahoma Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Oklahoma Supreme Court's interpretation of Tit. 10 Okla. Stat. § 7505-4.2 is contrary to the laws of this Court and therefore subject to review by Writ of Certitorari.

II. Whether the Oklahoma Supreme Court's interpretation of Tit. 10 Okla. Stat. § 7505-4.2 is in conflict with the settled law of other states and therefore subject to review by Writ of Certiorari.

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STATEMENT OF THE CASE

This case arose from the trial court's determination that the minor, CDM (now age 6), was eligible for adoption without the consent of his biological father. The evidence at trial was undisputed that the biological father has had no relationship of any kind with CDM since CDM was six months old. CDM was born out of wedlock.

In August 1996, a Permanent Protective Order (the "VPO") was entered against Petitioner in favor of the Mother, Kori Wyman, and CDM after Petitioner became intoxicated and forcibly took and threatened the child in an effort to detain the Mother. The VPO instructed Petitioner not to visit or communicate with either the Mother or CDM. However, the VPO specified on its face that it could be modified by an assigned judge in any domestic proceeding between the parties. Petitioner never asked that the VPO's constraints on communication with the child be modified, although he participated in a paternity proceeding in which he was represented by counsel.

In March 1997, Petitioner was arrested and charged with criminal trespass on the property of the Mother, stalking, repeatedly following and telephoning the Mother, breaking into the apartment of the Mother and hiding in her closet, and violating the VPO. (Petitioner admitted during the trial in the instant matter that he had broken into the Mother's apartment on at least one previous occasion for which he was not caught.) Thereafter, in August 1997, Petitioner assaulted and battered the Mother in a convenience store parking lot and attempted to take CDM forcibly from her car. This criminal assault on the Mother occurred in the presence of the child.

Petitioner was found guilty on these felony stalking and assault and battery charges, and he was sentenced to prison. For unknown reasons, the authorities failed to take Petitioner into custody to begin serving his prison sentence until November 1998.

In June 1997, Petitioner filed a Petition to Establish Paternity and Request for Visitation with CDM. This was the first attempt made by Petitioner to modify the limitations of the VPO. In October 1997, a Temporary Order was entered which denied Petitioner visitation with CDM. The Temporary Order did not address written or telephonic communication between Petitioner and CDM, but Petitioner never asked that the VPO be modified to allow any written or telephonic communication between Petitioner and CDM. It was clear to all concerned that Petitioner's true motivation was to have contact with the Mother rather than to establish a relationship with CDM. Petitioner, through his counsel, ultimately executed an Agreed Decree of Paternity which denied him visitation with CDM and which did not address any other forms of communication between Petitioner and CDM.

During all of the relevant period of December 11, 1998 to February 11, 2000, the Petitioner was incarcerated for felony stalking of the Mother and violation of the VPO and for assault and battery of the Mother. Petitioner had access to telephones and postal facilities while he was incarcerated. However, he had no contact whatsoever with CDM during the relevant period, and he did not ask the court to allow such contact.

Petitioner was given notice of the Petition to Determine the Child Eligible for Adoption Without His Consent, and he appeared at trial with counsel. Petitioner participated fully in the bifurcated proceeding. First, the trial court heard evidence regarding whether the Petitioner had willfully failed to establish a significant relationship with CDM. Petitioner stipulated that he had no relationship with CDM whatsoever since CDM was six months old. Petitioner merely attempted to prove that his failure to establish a relationship with CDM should be excused as non-willful because he was serving his prison sentence arising from his conviction for criminal acts directed at the Mother and CDM. The trial court heard and considered his evidence and found that, based on the facts and circumstances of this case, Petitioner had willfully failed to establish a significant relationship with the child.

Second, the trial court conducted a trial on the issue of the best interest of the child. Petitioner fully participated in this trial, including testifying and calling witnesses. All parties and the child were represented by counsel. The adoptive father had raised CDM since he was an infant, provided all of his financial support, and was the only father CDM had ever known. After a full trial on this issue, the trial court found that the adoption was in the best interest of the child.

ARGUMENT

PROPOSITION I

The Oklahoma Supreme Court's decision was consistent with the Fourteenth Amendment and relevant decisions of this Court.

The rules of this Court provide that writs of certiorari should be granted only for compelling reasons. Sup. Ct. R. 10. Indicative of the character of a case warranting review is a state court of last resort who has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Petitioner contends that the Oklahoma Supreme Court's decision violated his rights under the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 1. An essential component of procedural fairness is the opportunity to be heard. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

This Court has held that the Federal Constitution provides protections to an unwed father who comes forward "to participate in the rearing of his child." *Caban v. Mohammed*, 441 U.S. 380, 392 (1979). Only at that point may it be said that he "act[s] as a father toward his children." *Id.* at 389. Further, a biological father who fails to grasp the opportunity for a relationship with the child and who fails to accept some measure of responsibility for the child's future does not earn constitutional protections. *Lehr v. Robertson*, 463 U.S. 248 (1983). This only makes logical sense, given that the Court is attempting to balance the rights and protections of the child as well as the parents.

In the instant action, the Oklahoma Supreme Court upheld the trial court's termination of Petitioner's parental rights on the basis that Petitioner willfully failed to maintain a significant relationship with CDM through visitation or communication for a period of 12 consecutive months, pursuant to Tit. 10 Okla. Stat. § 7505-4.2(H) (Supp. 1998). Petitioner asserts that he was effectively denied his opportunity to be heard because the Oklahoma Supreme Court rejected his argument that he had an absolute defense to the action based on the circumstance of his incarceration or the VPO.

Petitioner, however, mischaracterizes the proceedings below. The trial court entered an order allowing for termination of Petitioner's parental rights after considering all of the evidence presented by both parties. The trial court found that the specific facts of this case showed by clear and convincing evidence that Petitioner had willfully failed to maintain a significant relationship with the child. The stipulated facts presented to the trial court included: (1) Petitioner has had no relationship of any kind with CDM since the child was six months old; (2) Petitioner, due to his own threatening and illegal conduct toward the Mother and CDM, had a VPO placed against him ordering him not to contact the Mother or child; (3) Petitioner, due to his own threatening and illegal conduct towards the Mother and child in violation of the VPO, was incarcerated after he assaulted the Mother in the presence of the child, attempted to take the child, and broke into the Mother's home; and, (4) the VPO provided that at any time Petitioner could seek modification of the protective order but Petitioner failed to make any request to the Court to modify the protective order so as to allow

communication with the child during the relevant time period.

Contrary to the assertions of Petitioner, the Oklahoma Supreme Court did not hold that incarceration of a parent in and of itself provided grounds for termination of parental rights. Rather, consistent with the Court's precedent, the Oklahoma Supreme Court held as follows:

> While incarceration of a parent during the relevant statutory period, standing alone, may not furnish a ground for automatic termination of parental rights, neither does incarceration insulate an inmate from the termination of parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent. Nevertheless, although parental rights may not be terminated solely for a parent's incarceration, parental incarceration and the reason for the incarceration – i.e., the nature of the crime committed as well as the person against whom the criminal act was perpetrated – are relevant to the issue of whether parental consent to an adoption is necessary. The question of intent is to be determined in each case from all of the facts and circumstances.

App. C to Petition for Certiorari at 12. In affirming the trial court's termination of Petitioner's parental rights, the Court specifically relied on several facts, including the fact that the only attempts made by Petitioner to pursue any kind of contact with the child were illegal actions and that the reasons for both the VPO and his incarceration stemmed from threatening conduct toward both the child and Mother. Petitioner was given the opportunity to present his defense that his incarceration

and the pending VPO prevented him from maintaining a significant relationship with CDM during the relevant time period; however, the court gave little weight to this argument in light of the compelling facts and circumstances in this particular case. The Oklahoma Supreme Court concluded:

> When a parent is incarcerated during the relevant statutory period, the question of intent is to be determined in each case from all of the facts and circumstances including the nature of the crime committed as well as the person against whom the criminal act was perpetrated. A father who was denied visitation and who was incarcerated for stalking and assaulting the mother and violating a protective order which was entered to protect the child and its mother from the father's acts of violence may not rely on the existence of court orders to excuse his lack of relationship with the child.

App. C to Petition for Certiorari at 22.

This case presents a situation in which the biological father clearly has no federal constitutional protections. Due to his own inaction and criminal malfeasance, Petitioner has insured that the child has no relationship with him whatsoever, other than a genetic link. "But the mere existence of a biological link does not merit equivalent constitutional protections." *Lehr*, 463 U.S. at 261.

Nevertheless, the procedural safeguards in place throughout these proceedings actually provided Petitioner all of the due process rights he would have enjoyed had he earned such constitutional protections, including an opportunity to be heard and present his defense. Petitioner seeks review from this Court because he disagrees

with the weight afforded his defense by the Oklahoma Supreme Court. However, as the rules of this Court indicate, a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Thus, review of the instant case is clearly unwarranted. Petitioner has not presented this Court with a sufficiently compelling basis for granting certiorari. He is unable to demonstrate that the Oklahoma Supreme Court in this instance decided an important federal question in a way that conflicts with relevant decisions of this Court.

PROPOSITION II

The Oklahoma Supreme Court's decision does not present a conflict with other states necessitating review by this Court.

The Rules of this Court provide that granting certiorari may be appropriate where a state court of last resort has decided an important question of federal law in a way that conflicts with the decision of another state court of last resort. Sup. Ct. R. 10(b). Petitioner contends that the Oklahoma decision interpreted a fundamental constitutional right in a manner that conflicts with decisions of South Carolina, Utah, Alaska, Florida, Indiana, Pennsylvania, and Texas. However, Petitioner has misstated the Oklahoma Supreme Court's decision as well as the controlling law in each of these states. In each of the states listed by Petitioner, the law permitting termination of parental rights on the basis of willful abandonment or desertion while in prison has been interpreted in a manner wholly consistent with the Oklahoma Supreme

Court's decision. Each of these jurisdictions has held that while incarceration, standing alone, may not provide a basis for abandonment, incarceration *and the circumstances surrounding the incarceration* may provide a basis for termination of parental rights due to abandonment or lack of meaningful contact.

With respect to South Carolina, Petitioner cites to S.C. Code Ann. § 20-7-1572(3) which provides that parental rights may be terminated on the ground that the parent has willfully failed to visit the child. This section further provides that in order to terminate parental rights on this basis, it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The South Carolina Supreme Court in interpreting and applying this section has recognized that a parent who is incarcerated during the relevant statutory time may have their parental rights terminated under this section, finding that incarceration coupled with additional circumstances could warrant a finding of willful failure to visit the child. *Dep't of Soc. Servs. v. Henry*, 296 S.E.2d 298, 299-300 (S.C. 1988) (finding "voluntary pursuit of a course of lawlessness resulting in imprisonment, coupled with flagrant indifference towards the children during intervening periods of freedom, manifests abandonment"); *Hamby v. Hamby*, 216 S.E.2d 536, 538-39 (S.C. 1975) (finding willful lack of contact after considering all of the surrounding circumstances, including the voluntary nature of the criminal act and its consequences and the nature of the parent-child relationship during times when the father was not incarcerated); *see also South Carolina Dep't of Soc. Servs. v. Wilson*, 543 S.E.2d 580,

583-84 (S.C. 2001) ("To determine whether a parent's failure to support or visit during the time of incarceration evinces a settled purpose to forego parental responsibilities requires a comprehensive analysis of all of the facts and circumstances.") (internal citations omitted).

Likewise, the Utah courts have held that while incarceration of a parent, standing alone, does not provide a basis for a finding of willful desertion, certain circumstances surrounding the incarceration may provide a sufficient basis. *Utah v. KHC*, 940 P.2d 1229, 1234-35 (Utah Ct. App. 1997) (recognizing that a trial court could permissibly find incarcerated parent had voluntarily failed to maintain contact with a child if while incarcerated he failed to communicate through available means such as mail and telephone). The Supreme Court of Alaska has held that the issue to be addressed in evaluating the willfulness of an incarcerated parent's lack of contact with a child is "whether the constraints [i.e., incarceration] imposed on [the parent] were the result of his own conduct, in which case his failure to communicate would not be justifiable, or were instead the result of circumstances over which he had no control." *In re J.J.J.*, 718 P.2d 948, 953 (Alaska 1986), *clarifying R.N.T. v. J.R.G.*, 666 P.2d 1036 (Alaska 1983). The Florida courts have found willful abandonment where an incarcerated parent made no attempts to communicate with the child via mail or telephone and never made any inquiries through friends or relatives as to the well-being of the child. *Turner v. Turner*, 352 So.2d 957, 959-60 (Fla. Dist. Ct. App. 1977). The Indiana courts have likewise found willful abandonment where an incarcerated parent had made no substantial effort to communicate with the child nor taken any legal

action to enable visitation or communication with the child. *Williams v. Townsend*, 629 N.E.2d 252, 253-54 (Ind. Ct. App. 1994). The Supreme Court of Pennsylvania found willful abandonment where the preponderance of the evidence revealed that while in prison, the parent did not take advantage of visitation rights nor make any sincere or persistent efforts to locate or inquire about the child. *In re McCray*, 331 A.2d 652, 655 (Pa. 1975). Lastly, the Texas courts recently found that a father who was incarcerated and made only two attempts to discover information about his child while he was in prison had willfully failed to maintain significant contact with his child and was thus subject to termination of his parental rights. *In re B.A.*, 2001 WL 578314 at *4 (Tex. Civ. App. May 31, 2001) (unpub. op.).

Each of these cases indicate that the various states noted by Petitioner have employed an analysis consistent with the Supreme Court of Oklahoma when evaluating whether parental rights of an incarcerated parent should be terminated without consent. All of these states, like Oklahoma, have concluded that while incarceration in and of itself is not a sufficient basis for finding willful abandonment (and thus grounds for termination of parental rights), incarceration may be considered in light of the surrounding circumstances in determining that abandonment of the child was intentional.

Each of these states, like Oklahoma, has balanced the rights and responsibilities of the parents and the children, recognizing that a biological father's rights are not paramount to the best interests of the child, and has set out appropriate standards to attempt to protect the rights of

all parties based on the particular circumstances of each case.

No conflict among the state courts exist with respect to this issue. Thus, review by this Court is unnecessary and unwarranted.

CONCLUSION

Accordingly, Respondents respectfully request this Court deny the petition for writ of certiorari so that this child may finally be adopted and fully and legally incorporated into the only home he has ever known.

Respectfully Submitted,

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